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February 26, 2008

Ms. Ann Cole, Director
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Re: Docket No. 070183-WS

Dear Ms. Cole:

Enclosed for filing on behalf of Aqua Utilities Florida, Inc. ("AUF") are the following documents:

1. Original and fifteen copies of Aqua's Posthearing Brief; and
2. A disk containing a copy of the document in Word format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

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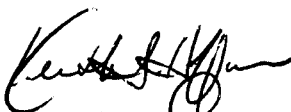
SCR _____ cc: Roseanne Gervasi, Esq., with enclosure
Stephen C. Reilly, Esq., with enclosure

SGA _____ Martin S. Friedman, Esq., with enclosure

SEC _____ Kimberly A. Joyce, Esq., with enclosure

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Sincerely,


Kenneth A. Hoffman

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01432 FEB 26 08

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed adoption of Rule 25-30.4325,)
F.A.C., Water Treatment Plant Used and)
Useful Calculations.)
_____)

Docket No. 070183-WS

Filed: February 26, 2008

**AQUA UTILITIES FLORIDA, INC.'S
POSTHEARING BRIEF**

Aqua Utilities Florida, Inc. ("AUF"), by and through its undersigned counsel, and pursuant to Order No. PSC-07-0777-PCO-WS issued September 25, 2007, hereby files its Posthearing Brief.

A. AUF'S BASIC POSITION

AUF supports proposed Rule 25-30.4325 as a whole. The proposed rule, in its entirety, represents the culmination of the efforts of the Commission Staff and interested parties to develop a fair and workable rule which permits utilities the opportunity to recover their prudent, used and useful investment in water treatment plants. The Commission Staff has done an exemplary job of coordinating and considering, through workshops and written comments, the input and positions of Commission regulated utilities, the Office of Public Counsel ("OPC"), the Department of Environmental Protection, the Water Management Districts and the Florida Rural Water Association. Generally speaking, the proposed rule as a whole would codify, in large part, prior Commission decisions and would help reduce continued litigation over used and useful issues, the cost of which ultimately is borne by the utility's customers.

This proceeding arises from a Petition filed by OPC challenging the proposed rule in its entirety. As the Petitioner, OPC bears the burden of demonstrating by a preponderance of the evidence that the alternative proposals it has presented should be adopted by the Commission instead of the specific provisions in the proposed rule. Given OPC's wholesale attack on the

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proposed rule, AUF has offered its own alternative proposals with respect to a few specific provisions in the proposed rule. As the proponent of such changes, AUF bears a similar burden of proof with respect to its limited number of alternative proposals.

1. OPC's Positions are Fundamentally Flawed

OPC's numerous, evolving alternative rule proposals are hampered by a five major deficiencies. These deficiencies are fundamental and undermine OPC's positions on the various specific issues that will be addressed in this proceeding. Each of these five fundamental flaws in OPC's case are summarized below:

a. OPC's Witness Lacks Expertise in Commission Regulatory Matters and in the Area of Used and Useful Principles and Methodologies.

The whole subject of used and useful and the Commission's application of used and useful principles and methodologies date back at least to the 1980s as discussed in the testimony of Utilities, Inc.'s witness, Mr. Seidman (Tr. 189; Ex. 9). Mr. Seidman and Mr. Guastella, AUF's witness, came to the Commission with decades of experience as experts in the regulation of investor-owned water and wastewater utilities and used and useful determinations in particular. Their respective resumes and breadth of experience as experts in used and useful methodologies are vast. (Tr. 122, Ex. 4; Tr. 184-6, Ex. 8).

Mr. Woodcock, OPC's witness, on the other hand, is a novice in the area of Florida Public Service Commission regulation and used and useful issues in particular. Mr. Woodcock's testimony and attached resume (Ex. 2, ATW-1) say nothing regarding any experience in the FPSC regulated regulatory process and used and useful methodologies specifically. Mr. Woodcock has never testified before this Commission on used and useful issues. (Tr. 68). By

his own admission, his focus and expertise is in the assistance of governmental water and wastewater utilities which do not establish rates based on used and useful calculations. Id.

Accordingly, the Commission should appropriately give little weight to the opinions expressed and proposals presented by Mr. Woodcock with respect to the specific issues in this proceeding due to the lack of his qualifications and expertise.

b. OPC Repeatedly Attempts to Challenge Specific Rule Proposals by Casting Them Into An Alternative Methodology Section in Derogation of the Purpose and Goals of This Rulemaking.

Mr. Woodcock's testimony reflects a pattern where he attempts to justify his criticism of a specific provision in the proposed rule by asserting that the issue or methodology addressed in the specific provision can always be raised in the alternative methodology section which is found in Section (3) of the proposed rule.¹ Mr. Woodcock's repeated attempts to defeat specific rule provisions by burying them as future possibilities under the alternative methodology section should be rejected by the Commission.

When this issue was addressed on cross examination at the hearing, the effect of Mr. Woodcock's testimony was to concede that his strength of alternative methodology proposals (five in total) runs counter to the purpose and objectives of this rulemaking.

Mr. Woodcock readily agreed with Messrs. Guastella and Redemann that one important objective of the proposed rule is to establish reasonable used and useful criteria that eliminate unnecessarily and costly litigation. (Tr. 70-71, 84-85, 123, 270). Due to his lack of experience and expertise in the regulated utility ratemaking process, Mr. Woodcock did not appear to have first hand knowledge but stated his general understanding and agreed with Mr. Redemann that the costs of used and useful litigation are passed on to a utility's customers. (Tr. 71, 270). Mr.

¹Tr. 52-58, 61-62, 64.

Woodcock also conceded that the general purpose of agency rulemaking is to codify agency policies to avoid repeated litigation on the same issue.

These admissions undermine OPC's repeated attempts to challenge specific provisions of the proposed rule by taking the position that these proposals can be addressed as an alternative methodology. Acceptance of this approach by the Commission would defeat the very goals and objectives of rulemaking, conceded by OPC, which are to develop a set of acceptable used and useful criteria and methodologies to avoid or at least substantially mitigate the cost of repeated litigation over the same used and useful issues - - costs which are ultimately borne by utility customers. As Mr. Woodcock ultimately conceded, the more expressly stated and defined rules and methodologies ultimately incorporated in the proposed rule, the less litigation in the future over specific used and useful issues.

c. OPC's Proposal for A Separate Rule Provision for High Service Pumping Is Unnecessary and Inappropriate.

With respect to high service pumping, there should not be a separate rule provision providing for a used and useful calculation for high service pumping. In most cases, there is no need to perform a separate used and useful calculation for high service pumping. In such instances where a separate used and useful calculation for high service pumps may be appropriate, such factors as the configuration of the piping and the specific operation of the high service pumps must be taken into account, thereby making it impractical and inappropriate to develop a formulaic rule for used and useful for high service pumps.

d. OPC's Attempt to Inject the AFPI Rule Into This Proceeding Should be Rejected.

In its basic position, OPC attempts to support its overall position and position on specific issues by reference to Rule 25-30.434, Florida Administrative Code, which is the Commission's rule allowing Allowance For Funds Prudently Invested ("AFPI") Charges. The AFPI rule has no relevance in this proceeding as demonstrated by the Chairman's ruling during the final hearing. (Tr. 285-87). Further, there is no evidence in the record concerning the AFPI rule that could support any determination on any issue based on a reliance on the AFPI rule.

e. OPC's Reliance on DEP's Minimum Standards is Flawed.

OPC also advocates a general adherence to minimum design standards for water treatment facilities set forth in the rules of the Florida Department of Environmental Protection ("DEP") (Woodcock, at Tr. 48, 50, 315). This attempt to reduce used and useful percentages through the application of minimum design standards should be rejected by the Commission. As explained by Mr. Seidman, DEP minimum design standards are not intended to act as a surrogate for purposes of cost recovery for a Commission-regulated utility. (Tr. 201-02). Moreover, the DEP witness in this proceeding, Mr. Hoofnagle, who is responsible for the implementation of the federal and state Safe Drinking Water Acts in Florida, stated without equivocation that DEP supports a utility's decision to design and construct wells, treatment and storage facilities that are larger than DEP's minimum criteria. (Tr. 250, 253).

2. AUF's Alternative Rule Proposals Are Supported by a Preponderance of the Evidence.

AUF has offered a limited set of alternative rule proposals which - - unlike OPC's proposals - - are supported by a preponderance of the evidence. These proposals reflect minor

modifications that make the rule more effective and consistent with ratesetting and cost principles. They are summarized below and should be adopted by the Commission:

a. Proposed Rule 25-30.4325(1)(a) -- High service pumps should be separated from storage facilities for purposes of identifying their cost and percentage used and useful. For the reasons stated above, the calculation of used and useful for high service pumps should not be added as a separate rule provision.

b. Proposed Rule 25-30.4325(1)(c) and (d) -- In defining peak demand and accounting for fire flow, the definitions should be expanded to allow recovery of “an appropriate fire flow” to ensure that utilities recover the cost of fire flow requirements for multiple hydrants throughout an entire service area. This amendment would permit utilities to recover the cost of facilities necessary to meet fire flow requirements over the entire system and as necessary to combat multiple or coincidental fires, or buildings requiring higher flows than may be identified by local fire departments or districts.

c. Proposed Rule 25-30.4325(1)(c), (d) and (7) -- Peak demands should not be reduced by excessive unaccounted for water when calculating the cost of plant and facilities that are used and useful. The cost of treatment facilities does not diminish if a system’s lost and unaccounted for water becomes excessive over time. The more appropriate response is to conduct a cost-benefit analysis to determine if the cause(s) of the excessive unaccounted for water should be repaired and, if so, adjustments for unaccounted for water should be limited to operating expenses.

d. Proposed Rule 25-30.4325(7)(a) and (b) -- Peak demands, either maximum day or peak hour, should not be limited to a rate setting test year. Water systems are not designed for a rate setting test year but, instead, for the maximum demand whenever it might occur.

e. **Proposed Rule 25-30.4325(7)(a) and (b)** -- If there is an unusual occurrence on the single maximum day or peak hour in determining peak demand, the rule should be amended to provide for the use of the next highest maximum day so long as there is not an unusual occurrence on that day, rather than the use of the average of the five highest days within a thirty day period.

B. ISSUES, POSITIONS AND ARGUMENT

Issue A: Which party bears the burden of proof to demonstrate that specific provisions of proposed Rule 25-30.4325 should be not be accepted?

AUF's Position: *As the Petitioner in this proceeding, the Office of Public Counsel bears the burden of proof in its comprehensive attack on the Staff's proposed rule. AUF bears a similar burden of proof with respect to individual challenged provisions.*

Argument: This proceeding is a "draw out" proceeding initiated by OPC pursuant to Section 120.54(3)(c)2., Florida Statutes. Under generally accepted principles of administrative law, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Balino v. Department of Health & Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). This burden applies equally as well in a draw out proceeding:

The purpose of this "draw out" proceeding is to allow Petitioners to make an effective presentation of their evidence and arguments concerning these proposed rules, and to permit the parties to make statements under oath, conduct discovery, and cross examine witnesses. The "draw out" proceeding allows greater input than is available at a public rulemaking hearing. Balino v. Department of Health and Rehabilitative Services, 362 So.2d 21 (Fla. 1st DCA 1978); cert. den., 370 So.2d 458; appeal dismissed, 370 So.2d 462, Whitehall Boca v. Department of Health and Rehabilitative Services, 456 So.2d 928 (Fla. 1st DCA 1984).

Petitioners are asserting the affirmative of the issue in this case by contending that the Department should have approved, rather than

rejected, their Map Amendments. The burden in a rule challenge is on the party attacking an agency's proposed rule. Accordingly, the Petitioners have the burden of proof. Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412 (Fla. 4th DCA 1974); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1981); Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 760 (Fla. 1st DCA 1978).

See In re: Petitions for Draw-Out Proceedings, Case Nos. 88-1067-RP et al. (Fla. Div. of Admin. Hearings Mar. 28, 1989) (recommended order to Florida Department of Community Affairs regarding a proceeding examining the validity of certain proposed rules).

While AUF has not found any case law in Florida which specifically states the evidentiary standard to be applied in a draw out proceeding, there is case law under traditional Section 120.56, Florida Statutes, rule challenge proceedings, which provides that the weighing of the evidence should be based upon a preponderance of the evidence standard. Department of Health v. Merritt, 919 So.2d 561, 564 (Fla. 1st DCA 2006). Without a specific precedent directly on point, AUF believes it would be appropriate for the Commission to similarly apply a preponderance of the evidence standard in this draw out proceeding.

Issue 2: Should the definition of storage facilities as proposed in Rule 25-30.4325(1)(b) be adopted?

AUF's Position: *No. High service pumps should be separated from storage facilities for purposes of identifying their cost and percentage used and useful. The calculation of used and useful for high service pumps should not be limited to a formula reflecting the ratio of demand to capacity.*

Argument: AUF agrees with OPC's position that high service pumps should be separately identified as to costs and that their percentage of used and usefulness should not be grouped with (part of) storage facilities. (Tr. 129). However, AUF disagrees that it is necessary

or desirable to have a separate rule provision addressing used and useful for high service pumps. The grounds and record support for AUF's position that the rule should not include a separate provision for determining a used and useful percentage for high service pumps are discussed under Issue 16.

Issue 3: Should the definition of peak demand as proposed in Rule 25-30.4325(1)(c) be adopted?

AUF's Position: *No. The definition should not exclude excessive unaccounted for water. Also, the fire flow provision should be amended to allow recovery of an appropriate fire flow or a minimum of either the fire flow required by the local governmental authority or 2 hours at 500 gallons per minute.**

Argument: AUF agrees with the language in subsection (1)(c) of the proposed rule with two exceptions. First, AUF maintains that it is not appropriate to reduce peak demand (and thereby the calculation of used and useful plant) by excessive unaccounted for water. Second, AUF believes it would be appropriate to amend the language addressing the inclusion of fire flow to allow recovery of "an appropriate fire flow" amount above and beyond the minimum of either the fire flow required by the local governmental authority or two hours at 500 gallons per minute. Each of these issues is discussed below.

Excessive Unaccounted for Water

As explained by Mr. Guastella, whose testimony was not contradicted, it is not appropriate to adjust peak demands for excessive unaccounted for water because all systems inevitably experience increasing levels of unaccounted for water as they age. As systems age and unaccounted for water becomes greater, the cost the utility incurred to make an investment in the plant does not change and is not reduced. Therefore, a rule that decreases the used and useful

percentage for treatment plant based on excessive unaccounted for water prohibits a utility from recovering the costs incurred to serve its customers. (Tr. 139-140).

The record reveals that OPC's witness, Mr. Woodcock, agreed with the factual premises of Mr. Guastella's testimony. For example, Mr. Woodcock agreed that the Commission must allow a utility the opportunity to recover the full cost of serving existing customers on a current basis, plus a reasonable future period (a safety factor or cushion), plus growth. (Tr. 69, 137). He also agreed that all water systems experience water losses and unaccounted for water and that as systems age and water losses increase, the original cost of the system does not change. (Tr. 89). Finally, Mr. Woodcock recognized that a water system must meet its maximum demand even after water losses. (Tr. 90).

Thus, when considering the rationale and justification for AUF's proposed rule revision on this issue, the record demonstrates that the testimony of OPC witness Woodcock is in harmony with the testimony of Mr. Guastella. Moreover, to the extent there is any doubt on this issue, the Commission need only look to the testimony of the Staff witness, Mr. Redemann, who acknowledged that where unaccounted for water is in excess of 10% and the utility has taken steps to reduce the water loss, that a reduction in peak demand should **not** be made. (Tr. 305).

The preponderance of the evidence unequivocally supports a determination that there should not be a reduction in peak demand based on excessive unaccounted for water. Instead, as advocated by Mr. Guastella and acknowledged by Mr. Redemann, the more appropriate response from the utility is for the utility to conduct a cost/benefit analysis subject to review by the Commission as to whether it is cost effective to correct the problem causing the excessive unaccounted for water, and to allow for recovery of such costs if the Commission agrees with the actions taken by the utility. (Tr. 126, 139-40, 155-60, 305).

that take into account the requirements of the Insurance Service Organization (“ISO”) and its predecessor, the National Board of Fire Underwriters (“NBFU”). (Tr. 127; Ex. 6, 7 and 22). These design standards and fire flow requirements are recognized and relied upon by engineers, water utilities and regulatory agencies throughout the country and have been recognized by the American Water Works Association (“AWWA”). (Tr. 328).

The ISO and NBFU publications contains various fire suppression ratings that actually measure the square footage of buildings, the type of construction material, and the other factors that are included as part of a complex analysis used by these organizations to determine fire flow requirements. (Tr. 169). Importantly, these two organizations have also graded thousands of communities as to their fire fighting ability, including the reliability of water systems serving those communities. (Tr. 329). As confirmed in Staff’s cross examination of Mr. Guastella, an appropriate fire flow for a specific service area can be developed from the design standards and fire flow requirements included in these publications.

Mr. Guastella brings decades of regulatory experience to this issue that informs and buttresses his testimony. (Tr. 122; Ex. 4). He cited one example of an instance in Florida where a local government set a fire flow requirement that was exactly the same for each hydrant and clearly inadequate to meet the needs of the large residential or commercial structures situated in that specific service area. Nor did the per hydrant requirement address the overall fire flow requirement of the utility throughout the service area or the need to combat potential multiple fires, an issue of increasing concern in the State of Florida. (Tr. 329). Moreover, as noted by Mr. Redemann, the occurrence of a fire on a peak demand day is not unusual and can easily occur because many water treatment plants have the same or similar peak demand levels. (Tr. 291).

Mr. Seidman placed similar significance on a utility's capability to meet fire flow requirements. He described it as "one of the most important functions in providing water service" and pointed to comments filed with the Commission by the DEP which concurred and recognized the importance of the ability of a water treatment system to meet fire flow requirements. (Tr. 198-99).

In sum, the record supports the proposed fire flow revision offered by AUF. OPC offered little opposition to this proposal. Mr. Woodcock initially agreed that fire flow requirements need to be met for an entire water system and service area but then appeared to back track on that initial statement. (Tr. 87-89). In any case, the Commission should not place itself in a position of limiting cost recovery for fire flow requirements that are less than those required to insure adequate fire flow capacity and safety throughout an entire service area. The Commission's used and useful rule should appropriately recognize this need by allowing for the flexibility in the rule language suggested by AUF.

Issue 4: Should the definition of peak demand for storage as proposed in Rule 25-30.4325(1)(d) be adopted?

AUF's Position: *No. The definition should not exclude excessive unaccounted for water. Also, the fire flow provision should be amended to allow recovery of an appropriate fire flow or a minimum of either the fire flow required by the local governmental authority or 2 hours at 500 gallons per minute."*

Argument: See discussion under Issue 3.

Issue 5: Should the definition of excessive unaccounted for water as proposed in 25-30.4325(1)(e) be adopted?

AUF's Position: *No. If the Commission determines it is appropriate to exclude excessive unaccounted for water in defining peak demands, then EUW should be defined as finished potable water produced

(delivered to the system) that exceeds 10% of that production quantity.”*

Argument: As previously discussed under Issue 2, the record supports the revision to the proposed rule which would remove the reduction to the definition of “peak demand” for excessive unaccounted for water. With respect to the specific definition of excessive unaccounted for water under subsection (1)(e), it appears from the record that all parties agree to the proposed revision suggested by Mr. Guastella that this provision in the rule be amended to read: “Excessive unaccounted for water (EUW) is finished potable water produced (delivered to the system) that exceeds 10% of that production quantity.” (Tr. 126, 283, 316-17).

The Commission should reject OPC’s proposed amendment which would require a utility to provide written documentation of water use for flushing, fire fighting, and water loss through line breaks. OPC’s proposed language is vague and does not provide any specific direction regarding the level or type of documentation required. Further, utilities already must provide support for this information in rate case filings. (Tr. 208-09). OPC ultimately acquiesced on this issue. Mr. Woodcock admitted during the hearing that his language was vague and that the Commission already places the burden of proof on a utility to support each MFR schedule (the water uses at issue are identified as “other uses” in the MFRs). He also acknowledged that he was unaware that DEP requires documentation of unmetered water uses. (Tr. 103).

Issue 6: Should the Commission’s used and useful evaluation include a determination of prudence and consider economies of scale as proposed in proposed Rule 25-30.4325(2) and be adopted?

AUF’s Position: *Yes.*

Argument: This issue was one of several where OPC's witness, Mr. Woodcock, advocated removal of specific rule language, arguing that the issue could be addressed under the alternative methodology section. OPC's position should be rejected.

The notion of removing specific rule language which incorporates existing Commission practice and precedent in favor of an unspecified alternative methodology is a recipe for increased litigation costs ultimately borne by a utility's customers. (Tr. 72). Mr. Woodcock provided a test as to when a specific rule provision should be removed and potentially addressed under the alternative methodology section. According to Mr. Woodcock, that should only occur in "special or unique cases." (Tr. 73). There is nothing special or unique about prudence determinations or consideration of economies of scale. In fact, Mr. Woodcock admitted that a determination of prudence is neither special nor unique. (Tr. 73). Further, Mr. Woodcock testified that economies of scale are occasionally considered in the design and engineering of water treatment plants. (Tr. 73), thus either ignoring or overlooking scores of prior Commission rate cases and orders where the Commission has considered economies of scale in establishing and determining used and useful percentages for water and wastewater treatment plants.² Clearly, there is nothing special or unique regarding the consideration of economies of scale in developing used and useful percentages. To the contrary, the Commission has specifically stated that "within a used and useful calculation, prudence and economies of scale are always

²See, e.g., In re: Application by BETMAR UTILITIES for Staff-assisted rate case in Pasco County, 89 F.P.S.C. 2:196, 200 (Order No. 20787); In re: Application for a Staff-assisted rate case in Putnam County by SPORTMAN'S HARBOUR UTILITIES, 91 F.P.S.C. 1:124, 126-27 (Order No. 23973); In re: Application for a Rate Increase in Lee County by Gulf Utility Company, 91 F.P.S.C. 7:80, 88 (PAA Order No. 24735); In re: Application of OCALA OAKS UTILITIES, INC. for a rate increase in Marion County, 89 F.P.S.C. 177, 179 (PAA Order No. 21349); In re: Application of OCALA OAKS UTILITIES, INC. for a rate increase in Marion County, 89 F.P.S.C. 6:177, 179-81 (Order No. 2134); In re: Application for rate increase in Monroe County by Key Haven Utility Corporation, Order No. PSC-03-0351-PAA-SU issued March 11, 2003, at 11; In re: Application for rate increase in Flagler County by Palm Coast Utility Corporation, Order No. PSC-96-1338-FOF-WS issued November 7, 1996.

considered.”³ This prior, consistent practice of the Commission should be encouraged and should remain intact under the proposed rule. (Tr. 71-72).

Issue 7: Should alternative calculations for water treatment systems and storage facilities be allowed as proposed in Rule 25-30.4325(3) and be adopted?

AUF’s Position: *Yes.*

Argument: All parties appear to agree that it is appropriate for the proposed rule to include an alternative methodology section. AUF maintains that this section of the proposed rule, Section (3), should be adopted as proposed, with one exception. AUF does not object to OPC’s proposal to expand the rule language to cover any and all parties to a rate case proceeding since all parties to such a proceeding would be bound by all of the other provisions in the rule. The Commission should reject the remainder of OPC’s proposed language.

OPC’s proposal includes language which incorporates a burden of proof provision. This is a judicial principle of law which should not be incorporated in an agency rule, and further, there is no underlying statutory authority for such language under Chapter 366, Florida Statutes.

OPC also includes examples of specific issues that would be the subject of an alternative methodology section. One such issues, consideration of economies of scale should remain under Section (2) of the proposed rule, as previously discussed. Other such issues fail Mr. Woodcock’s own test for determining whether an issue is special or unique and thus subject to the alternative methodology section. For example, with respect to “factors involving treatment capacity,” Mr. Woodcock admitted that there is nothing unique about pumping capacity being subject to a specific type of limitation. (Tr. 74). With respect to “changes in flows due to conservation or a

³ In re: Application for rate increase in Marion, Orange, Pasco, Pinellas, and Seminole Counties by Utilities, Inc. of

reduction in the number of customers,” Mr. Woodcock admitted that there is nothing special or unique about a decrease in flows due to conservation or a reduction in the number of customers. (Tr. 74). Accordingly, the Commission should reject OPC’s proposal to incorporate into the rule specific examples of issues or positions that might warrant the use of alternative used and useful calculations. OPC’s proposals are unnecessary, will increase the cost of litigation to the detriment of customers, and lack record support as they were undermined by OPC’s own witness.

OPC also suggests an amendment to this provision that would address the determination of an alternative peaking factor for a specific system. This proposal also suffers from a number of flaws. First, select used and useful methodologies are not appropriately included in an alternative methodology section. There is no basis in the record for arbitrarily including an alternative formula for determining used and useful on one particular issue while leaving all other potential alternative formulas outside of the provision. The alternative methodology section should be reserved to address all alternative proposals and methodologies that are outside the specific definitions, criteria and methodology set forth in the rule.

Second, OPC’s proposed language, by Mr. Woodcock’s own admission, is vague and ambiguous (Tr. 35-6), and therefore, fails to provide guidance regarding the Commission’s policy, which would only subject customers to increased litigation costs.

Finally, OPC’s proposal to move the language in subsection (4)(b) to the alternative methodology section is inappropriate. Recall that under Mr. Woodcock’s test, the alternative methodology section should only apply if the situation or occurrence at issue is special or unique. When asked about the prevalence of built out systems in Florida that have no potential for expansion, Mr. Woodcock simply did not know if such situations are special or unique. (Tr. 73).

Florida, Order No. PSC-03-1440-FOF-WS issued December 22, 2003, at 64.

As such, OPC has failed to justify removal of this provision from subsection (4)(b) and including it in the alternative methodology section.

Issue 8: Should the conditions for considering a water treatment system 100% used and useful as proposed in Rule 25-30.4325(4) be adopted?

AUF's Position: *Yes.*

Argument: As a general proposition, all parties agree that the rule adopted by the Commission should incorporate prior Commission determinations and capture Commission policy consistent with a primary purpose of rulemaking, which is to avoid the continued litigation of these issues and the costs associated therewith. (Tr. 71-72, 131-32, 213, 270). As noted by Mr. Seidman and Mr. Redemann, the three circumstances under which a water treatment system would be considered 100% used and useful under Section (4) of the proposed rule are consistently reflected in prior Commission decisions. (Tr. 213, 281-82). Accordingly, as set forth below, all three circumstances for 100% used and useful treatment should be adopted in the rule.

The System is the Minimum Size Necessary to Adequately Serve Existing Customers Plus an Allowance for Growth and Fire Flow.

Mr. Woodcock offers no factual or substantive support for his conclusion that the term “minimum size necessary” in subsection (4)(a) of the rule is subjective and would lead to increased litigation. (Tr. 55). It is a relatively elementary task to compare the capacity of a facility to peak demand as defined by the proposed rule. As illustrated in an exchange between Mr. Redemann and AUF’s counsel on cross examination, the purpose of this provision is to allow a utility to recover 100% of the costs of the minimum facility necessary to meet the peak demand of the utility. (Tr. 307-08). As such, this provision simply codifies prior Commission

determinations that no less of a facility could serve existing customers. See, e.g., In re: Application by BETMAR UTILITIES for Staff-assisted rate case in Pasco County, 89 F.P.S.C. 2:196, 200 (Order No. 20787); In re: Application for a Staff-assisted rate case in Putnam County by SPORTMAN'S HARBOUR UTILITIES, 91 F.P.S.C. 1:124, 126-27 (Order No. 23973).

The Service Territory the System is Designed to Serve is Mature or Built Out and There is No Potential for Expansion of the Service Territory

With respect to subsection (4)(b) of the proposed rule, Mr. Redemann cited numerous prior Commission orders finding water systems to be 100% used and useful where the service territory is built out and there is no apparent potential for expansion in the surrounding area. (Tr. 281). The rationale for the Commission's prior, consistent decisions on this issue was captured by Mr. Guastella who explained that in such cases, if the Commission does not consider such fully developed systems to be 100% used and useful, the utilities will never be able to recover the full costs of serving their existing customers. (Guastella, at Tr. 132). Moreover, the very reason used and useful adjustments are made with respect to water and wastewater utilities is that they are related to real estate developments that are growing. (Tr. 124). The used and useful adjustments assure that utility customers do not bear the cost of the risk of the success of the real estate project. Clearly, once the real estate project is mature or complete, there is no longer a basis for used and useful determinations.

Mr. Woodcock's testimony reflected a level of confusion on this issue. In his rebuttal testimony, Mr. Woodcock acknowledged Mr. Redemann's statement that 100% used and useful treatment under this provision is appropriate where the service territory is built out, there is no apparent potential for expansion in the surrounding area, and it appears the system was designed

prudently. (Tr. 281). Mr. Woodcock then suggested that “one of initial steps to determining if a system was prudently designed was to perform a used and useful calculation.” (Tr. 319). However, on cross examination, Mr. Woodcock admitted that engineers do not perform used and useful calculations when they design water systems. (Tr. 86). Used and useful is a ratemaking concept that does not enter into the equation when an engineer designs a water treatment system, and, thus, Mr. Woodcock’s objection is misplaced.

The System is Served by a Single Well

Finally, OPC objects to subsection (4)(c) which would consider a system served by a single well to be 100% used and useful. Once again, Mr. Redemann listed a number of Commission orders reflecting the Commission’s consistent practice of determining water utilities with only one well to be 100% used and useful. (Tr. 282). Further, as explained by Mr. Guastella, precluding 100% used and useful treatment of a single well system would prohibit a utility from recovering its cost of service. (Tr. 131-32).

Issue 10: Should the definition of firm reliable capacity for various combinations of water treatment systems and storage facilities as proposed in Rule 25-30.4325(6) be adopted?

AUF’s Position: *Yes.*

Argument: AUF supports the proposed rule language. Much of the disagreement in this proceeding focuses on the provision in subsection (6)(b) of the proposed rule which states that “firm reliable capacity is expressed in gallons per day based on 12 hours of pumping for systems with storage capacity.” As summarized by Mr. Guastella, the 12 hour period “provides a reasonable balance that recognizes typical consumption characteristics in terms of time periods, and recognizes the typical factors of resting wells to allow time for recharge.” (Tr. 132).

The Commission has used a 12 hour day to determine well capacity as a matter of policy and practice. (Tr. 278-79). Mr. Redemann and Mr. Guastella emphasized that wells should have down time to allow the aquifer to recharge and that “it is environmentally responsible and prudent to rest a well for 12 hours per day so that the ground water can recharge.” (Tr. 132, 278). Mr. Jenkins, the Director of the Division of Water Reuse Regulation for the St. Johns River Water Management District, agreed with this approach. Mr. Jenkins also emphasized that public water supply pumps should have “down time” each day so that the aquifer can recharge its specific pumping zones and thereby avoid harms such as localized resource impacts, interference with existing legal uses or saline water intrusion. (Tr. 262). He further testified that it is reasonable to base firm reliable capacity on a duration of well pumping that is less than 24 hours, such as the 12 hour day set forth in the proposed rule. (Tr. 263-64).

In sum, the evidence overwhelmingly supports the use of 12 hours per day of pumping time for systems with storage capacity. This practice not only reflects the general usage pattern of customers but best addresses issues of poor water quality and the need for aeration to address hydrogen sulfide. (Tr. 278, 299; Ex. 15).

Issue 11: Should the basis for expressing peak demand as proposed in Rule 25-30.4325(7) be adopted?

AUF’s Position: *No. These provisions should be amended to: (1) strike the reduction for excessive unaccounted for water; and (2) use the highest maximum day that does not reflect an unusual occurrence on such day, without the limitation that such highest maximum day have occurred in the test year.*

Argument: AUF proposes three changes to Section (7) of the proposed rule. Each proposed change is supported by a preponderance of the evidence as discussed below.

First, as discussed under Issue 3, AUF proposes to strike the reduction in peak demand for excessive unaccounted for water. Unaccounted for water is really an operating expense problem. Adjustments for excessive unaccounted for water should be limited to variable costs for electric power and chemicals. (Tr. 156, 162). By taking such an approach, the Commission would be sending a signal to the utility that it will continue to impose downward adjustments to certain operating expenses unless the problem is corrected. (Tr. 159-60).

With respect to plant, it is often very difficult and expensive to locate, detect and repair the problem or problems that are causing the excessive unaccounted for water. It is inappropriate and unreasonable to make a downward adjustment to an investment that was prudently made to serve the utility's customers. As previously discussed, the appropriate approach would be for the utility to analyze its unaccounted for water level and the incremental investment necessary to fix the problem and make a determination, subject to Commission review, as to whether it would be cost effective to fix the problem. (Tr. 155-162).

Second, AUF proposes that the proposed rule language be amended to use the single maximum day demand unless there is an unusual occurrence on that day, or the next highest maximum day that does not have an unusual occurrence on such day. The default to a five-day average is not supported by any engineering design criteria. (Tr. 80, 125). Additional defects with the use of a five-day average were summarized by Mr. Guastella:

The construction cost of water utility facilities is not based on a five day average demand but the maximum day demand. In fact, the engineering design would assume a maximum day demand in excess of the actually expected maximum day in order to provide a factor of safety or cushion in order to assure that there is ample capacity to meet unforeseen circumstances. In addition, the use of a five day average produces costs that are less than the actual cost of facilities that were needed on the days when the

demand was higher than the other days included in the average. The use of a five day average therefore, denies the cost of serving existing customers, let alone growth.

(Tr. 125-26). AUF maintains that the most appropriate and consistent approach in determining peak demand would be to default to the next highest day without an unusual occurrence. Indeed, Staff witness Redemann has used this approach in the past and agrees it would be reasonable.

(Tr. 206-7).

Finally, AUF proposes to remove the use of the “test year” in determining the single maximum day or the next highest maximum day without an unusual occurrence when determining peak demand, whether it be peak hour demand or peak day demand. The maximum demand should not be limited to a ratesetting test year because ratesetting test years are not part of any engineering design criteria used in the design and construction of water treatment facilities. (Tr. 125, 243). Once a water treatment utility hits a specific maximum demand, the utility must incur costs to provide that peak demand capacity without regard to when it occurs. That level of cost, whether it occurs within or outside of a ratesetting test year, should not be reduced because lower demand occurred during the ratesetting test year. (Tr. 125). This principle is incorporated in Section (11) of the proposed rule where the Commission would not necessarily reduce peak demand where flows have decreased due to conservation or a reduction in a number of customers. Indeed, as explained by Mr. Seidman, the Commission in the past had recognized that a drop in demand due to conservation should not result in a reduction in used and useful. (Tr. 243).

It is also noted that using the maximum day or peak hour demands outside the test year does not violate any ratesetting “matching” principle. There are some aspects of annual revenues and operating expenses for which fluctuations may be dependent upon each other, and therefore

require “matching.” On the other hand, once the costs to construct treatment plants and facilities have been incurred, they do not fluctuate with subsequent fluctuations in demands. While the costs of such assets never decrease, they may in fact increase in order to comply with DEP requirements that additional plant capacity be added well in advance of reaching higher anticipated maximum demands. (Tr. 125, 163-64, 172).

Accordingly, the Commission should adopt AUF’s proposal to not limit peak demands to a ratesetting test year. This proposal was not contested by OPC in Mr. Woodcock’s rebuttal testimony. Failure to adopt AUF’s proposal will preclude utilities from recovering their cost of service.

Issue 14: Should the method of determining adjustments to plant and operating expenses because of excessive unaccounted for water as proposed in Rule 25-30.4325(10) be adopted?

AUF’s Position: *No. There should be no adjustment to plant (only to operating expenses) based on excessive unaccounted for water. The more appropriate response is to conduct a cost/benefit analysis to determine if the cause(s) of the excessive unaccounted for water should be repaired.*

Argument: See discussion under Issues 3 and 11.

Issue 15: Should the Commission’s consideration of other relevant factors as proposed in Rule 25-30.4325(11) be adopted?

AUF’s Position: *Yes.*

Issue 16: Should there be a separate used and useful calculation for high service pumping?

AUF’s Position: *No. In most cases, there is no need to perform such a calculation. In addition, high service pumps typically comprise a very small percentage of total storage costs. Finally, it is impractical to develop a formulaic rule for used and useful for high service pumps.*

Argument: There should not be a separate rule provision for a used and useful calculation for high service pumping. The reasons are clear and straight-forward. Simply put, high service pumps are a very small part of the total cost of utility plant-in-service. (Tr. 140, Guastella). Many small and medium-sized systems do not have high service pumps. (Tr. 75, Woodcock). In fact, in AUF's last rate case, only 14 of the 56 water systems had separate high service pumps. (Tr. 141). Mr. Redemann provided a more detailed look at this issue. Mr. Redemann researched and developed a spreadsheet comparing high service pumping costs to total storage costs. His conclusions demonstrated that pumping costs are very minimal compared to storage costs - - about .3% of the total. In Mr. Redemann's experienced judgment, it is simply not cost effective to have a separate rule provision containing a used and useful calculation for high service pumps. (Tr. 294).

Exacerbating the problem with OPC's proposal is the fact that high service pumps often do not lend themselves to simple used and useful calculations. (Tr. 129, 166-67). Systems with multiple high service pumps will often operate at the same time and pump against pressure, resulting in flow rates that are less than their respective rated capacities. (Guastella, at Tr. 129; Woodcock, at Tr. 77-78). A formula that only provides for the ratio of demand to capacity would not be sufficient. A true and valid used and useful analysis requires judgments and analyses that are not readily convertible into a formula and are not cost effective, particularly in light of the relatively small percentage of a utility's plant-in-service dedicated to high service pumps. (Tr. 129, 166-67).

Issue 17: If there is a separate calculation for high service pumping, what is the proper definition for high service pumping?

AUF's Position: *See AUF's response to Issue 16. Because no separate rule is necessary for high service pumps, no definition is necessary.*

Issue 18: **If there is a separate calculation for high service pumping, what is the proper definition for peak demand for high service pumping?**

AUF's Position: *See AUF's response to Issue 16. Because no separate rule is necessary for high service pumps, no definition is necessary.*

Issue 19: **If there is a separate calculation for high service pumping, how should the firm reliable capacity of high service pumping be determined?**

AUF's Position: *After first subtracting the highest capacity pump, the reliable capacity of the remaining pumps can only be determined by taking into account limiting factors attributable to the actual operation of the remaining pumps.*

Argument: If the Commission adopts a rule provision containing a separate calculation for high service pumping, then the firm reliable capacity of high service pumping should be determined as follows: first, the highest capacity pump should be subtracted from the total capacity of all pumps; then, in determining the reliable capacity of the remaining pumps, one must take into account that the sum of the rated capacity of each pump may be more than the combined capacity of the pumps when operated at the same time, and that there may be limiting factors attributable to the actual operation of the remaining pumps.

AUF's proposal is supported by the record. OPC witness Woodcock agreed that the firm reliable capacity of high service pumps of high service pumps should be determined by removing the highest capacity pump from the total capacity of all pumps. (Tr. 79). Mr. Guastella and Mr. Woodcock concurred that there are times when two or more high service pumps operating simultaneously will yield flow rates that are less than their rated capacity. (Guastella at Tr. 129;

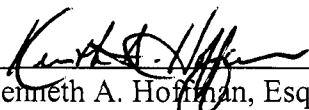
Woodcock at Tr. 77-8). Finally, Mr. Woodcock acknowledged that there may be limiting factors attributable to the operation of the remaining pumps. (Tr. 80).

Issue 20: **If there is a separate calculation for high service pumping, how should the used and usefulness of high service pumping be determined?**

AUF's Position: *The used and useful percentage for high service pumps should be calculated by dividing the greater of the peak hour demand or maximum day demand plus fire demand, in gallons per minute, by the reliable capacity of the high service pumps.*

Argument: If the Commission adopts a separate rule provision addressing used and useful for high service pumping, then the Commission should adopt the methodology proposed above by AUF. This methodology is supported by OPC witness Woodcock. (Tr. 79).

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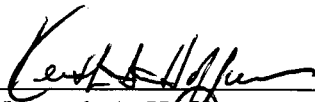
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Posthearing Brief was furnished by U. S. Mail this 26th day of February, 2008 to:

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